No. 80-5818

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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JOHN B. MUMFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's criminal prosecution was barred by res judicata or collateral estoppel after a district judge denied injunctive relief in a civil proceeding that involved the same misconduct.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is reported at 630 F.2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1980. The petition for a writ of certiorari was filed on December 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner and a co-defendant, Cortes W. Randell, were convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341, five counts of securities fraud, in violation of 15 U.S.C. 77q(a) and 77x, four counts of interstate transportation of securities and money obtained by fraud, in violation of 18 U.S.C. 2314, and one count of submitting a false statement to a United States agency, in violation of 18 U.S.C. 1001. Petitioner was sentenced to three years' imprisonment on the false statement count, with all but six months of the term suspended, and to concurrent five-year probation terms on all counts. The court of appeals affirmed (Pet. App. 2a-12a).[1/]

1. The indictment alleged and the government's evidence showed that throughout 1974 petitioner and co-defendant Randell used their positions in two Virginia corporations, the National Commercial Credit Corporation (NCCC), and the Federal Mortgage Acceptance Corporation (FMAC), to obtain large sums from financial institutions and private investors by fraudulent representations. They also concealed from investors material facts as to

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1/ Co-defendant Randell was sentenced to a total of seven years' imprisonment on the mail fraud counts. Imposition of sentence on the other counts was suspended in favor of a five-year probation term to run consecutively to the sentences imposed on the mail fraud counts.

the merits and value of their investments, and the extent of the involvement of petitioner and Randell in the corporations (Pet. App. 3a-5a). Both corporations dealt in second mortgages. Their business involved the purchase of homes with assumable mortgages, the sale of the homes for small down payments and a second trust note or mortgage, and the use of these mortgages to obtain money for further operations by selling them or pledging them as collateral (id. at 3a-4a; Tr. 90-92, 228).

In 1973 Randell was hired by the two founders of NCCC for the purpose of strengthening it and preparing it for a public offering of its stock by raising additional capital. Shortly thereafter, his wife loaned NCCC $140,000 and received as collateral $205,000 worth of NCCC second mortgages whose value was subsequently increased to $279,000 (Tr. 93-96, 105-106). Through such investments, Randell increased his control over NCCC, eliminated both of the two founders from its management, and brought petitioner into the company as vice-president and one of its directors (J.A. 154-156).2/ Thereafter, petitioner administered the operations of NCCC--approving expenditures, determining the movement and pledging of NCCC's second mortgage notes, and dealing with financial institutions and investors (e.g., Tr. 310, 315, 645, 786, 934).

In July 1974, Randell agreed to purchase from another participant in NCCC certain second mortgage notes that the participant had generated in Florida. NCCC purchased $139,000 worth of the notes at 60% of their face value. Simultaneously, Randell formed FMAC for the purpose of purchasing the remainder at 30% of their face value (Tr. 228, 398-399). FMAC was capitalized by use of the $279,000 worth of second mortgage notes that had served as collateral for the $140,000 loan by Randell's wife to NCCC: When

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2/ "J.A." refers to the joint appendix to the briefs in the court of appeals.

in July 1974 she called the loan due, NCCC elected to forfeit the notes instead of repaying the loan. Mrs. Randell endorsed the notes over to FMAC, which in turn, carried them as corporate assets on its July 1974 balance sheet and endorsed them over to the Maryland Industrial Finance Corporation to secure its capitalization (Pet. App. 4a; Tr. 585-586, 693-695).3/

Despite the fact that these second mortgages were listed on FMAC's balance sheets as assets, on petitioner's instructions they continued also to be listed on NCCC's books as assets of that company (J.A. 201).4/ In extending credit to FMAC and NCCC, Maryland National Bank relied upon such documents, and was not aware until 1975 that the notes were simultaneously listed as assets on the books of both ventures (Tr. 671, 1210, J.A. 208-210). It also relied upon the misrepresentations of petitioner and Randell that NCCC had been very successful and profitable, and a 1973 year-end NCCC financial statement which overstated that company's assets by $97,000 (Tr. 545, 552, 645, 651-652, 655).5/

NCCC had also raised money from private investors. In 1971 it made a $300,000 bond offering for 10% bonds to be secured by second trust mortgages equal to 125% of the amount borrowed. The bond prospectus promised that the collateral "will be held in the bank" (Pet. App. 5a; Tr. 97, 179, GX 3-B). In August 1974, petitioner and Randell endeavored to persuade the secured bondholders

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3/ Although Mrs. Randell had called the loan in July 1974, she continued to receive $1,600 per month from NCCC as interest on it throughout 1974 (Tr. 585).

4/ Notwithstanding these instructions, petitioner submitted the July 1974 FMAC balance sheet listing the notes as FMAC assets as part of his financial statement in applying for a home loan and guarantee (Tr. 729-730, GX. 5a). ("GX" refers to a government exhibit.)

5/ By July 1975, Maryland National had loaned more than $600,000 to NCCC (Tr. 660). During 1974 it loaned more than $300,000 to FMAC (Tr. 814-815). A Maryland National bank official stated that absent the concealment and misrepresentations the loans would not have been made (Tr. 690).

to exchange their 10% secured bonds for unsecured 12% bonds. In connection with this effort, the two drafted and mailed a letter to bondholders detailing the conversion offer but omitting certain material facts so that the offer was misleading. They did not disclose the fact that petitioner was simultaneously president of NCCC and its competitor FMAC, that Randell likewise participated in the operations of both companies, that Randell's wife had demanded payment of the NCCC loan and endorsed over to FMAC the second trust mortgage notes which had been collateral on the loan, and that she then owned 80% of the stock of FMAC and 25% of the stock of NCCC (e.g., Tr. 881-882, 898-899, 924-925). To further reassure the bondholders considering the exchange, petitioner and Randell met with several of them. Randell told one investor that NCCC was in sound financial condition, when, in fact, it was not, and gave him a copy of the false financial statement; petitioner assured another that NCCC was going to be in good shape (Pet. App. 6a; Tr. 876, 894-896, 961).

In early 1974, Harold Brammer, one of the founders of NCCC, discovered that the second mortgages that had been placed in a bank safe deposit box to secure the 1971 10% bond issue were missing (Tr. 101). After he filed a civil suit, he was permitted to inspect bond collateral which, in the meantime, had been assembled and placed in a safe deposit box to which petitioner had sole access. Brammer discovered that the mortgage notes, which ostensibly secured this issue, included some that previously had been declared worthless as collateral; others were among those endorsed over to FMAC by Mrs. Randell; still others were pledged to lending institutions as collateral for other loans (Pet. App. 5a; Tr. 101-107, J.A. 257).

In the fall of 1975 petitioner sought a loan from Metropolitan Mortgage Fund, and a loan guarantee from the Veteran's Administration to purchase a home. In connection with the purchase he borrowed $20,000 from Mrs. Randell and secured it

with a $27,000 deed of trust note on the property. On the applications, however, he indicated that he would not be using funds borrowed from other sources to purchase the home, thus concealing from the Veteran's Administration the fact that he had executed the $27,000 note on the property for which he was seeking the loan and guarantee (Pet. App. 6a; Tr. 751-752, 776-777).

2. On December 11, 1977, the Securities and Exchange Commission filed a complaint in the United States District Court for the Eastern District of Virginia seeking a permanent injunction and ancillary relief against petitioner, Randell, and others (Pet. App. 6a). The complaint alleged a fraud on investors, in violation of the securities laws: it cited the repledging of the collateral on Mrs. Randell's $140,000 NCCC loan to secure loans to FMAC, the removal from the bank safe deposit box of the mortgages that secured the 1971 bond issue, and the making of false and misleading statements to investors (J.A. 535-545). During a hearing on the complaint before Judge Oren B. Lewis[6/] the government was barred from presenting or proffering the testimony of all but one of NCCC's investors, and was curtailed in its examination of NCCC employees (e.g., J.A. 564-565, 569, 573-576, 578-579). Judge Lewis based his refusal to entertain such testimony largely on the ground, that, in his view, the hearing focused solely upon whether the requested injunctive relief should be granted, and that he did not intend to reach the merits of the charges concerning petitioner's past conduct (Pet. App. 8a; J.A. 568, 569, 581, 590, 598). Judge Lewis made it clear that he was "not going to find * * * whether [petitioner] committed any crimes or whether he has committed any specific wrongs" (J.A. 562-563). As a result, the only issue fully litigated in the SEC proceeding was whether petitioner was likely to violate SEC laws

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6/ Prior to the hearing, all of the defendants except petitioner consented to the entry of a permanent injunction without admitting or denying the SEC charges (Pet. App. 6a).

in the future (e.g., J.A. 594, 598, 603-609; Pet. App. 8a). Because Judge Lewis was satisfied that petitioner was no longer in the securities business, and had no intention of engaging in securities-related activity in the future, Judge Lewis issued an order denying an injunction (J.A. 608-609, 631-632).

Notwithstanding the limitations Judge Lewis had imposed on the scope of the hearing, the order stated that the evidence "falls far short of that necessary to find that [petitioner] had willfully violated any of the SEC laws." It also provided that "[t]he evidence further disclosed that [petitioner] has not engaged in the sale of any securities or worked for any organization regulated by the SEC for the past three and one-half years * * * and he has assured the Court that he has no intention of engaging in any activity involving the sale of any regulated securities or investments in the foreseeable future" (J.A. 631-632). It concluded that "[h]aving failed to prove that [petitioner] has either violated or is likely to violate the SEC laws, this suit must be dismissed * * *" (J.A. 631-632). 7/

Following the return of the indictment in this case, petitioner filed a motion to dismiss on the ground that criminal proceedings were precluded by the civil judgment. The motion was heard and denied by Judge Lewis, who explained that in the preceding civil action he had denied injunctive relief "strictly and mainly on the grounds that whatever he is supposed to have done, * * * the evidence is conclusive, that he isn't doing it now" (J.A. 56). A similar motion ws denied following petitioner's conviction by Judge Albert V. Bryan, Jr., the trial judge (J.A. 383-384).

7/ The court of appeals affirmed Judge Lewis' order on the sole ground that "the SEC failed to establish the essential predicate of injunctive relief--that there existed a reasonable likelihood of future wrongdoing by [petitioner]." SEC v. Mumford, No. 78-1386 (4th Cir. Feb. 22, 1980). See 618 F.2d 104 (4th Cir. 1980) (table).

The court of appeals affirmed (Pet. App. 2a-12a), expressly rejecting (id. at 7a-9a) petitioner's contentions that his prosecution was precluded under principles of res judicata and collateral estoppel.

ARGUMENT

Relying upon the statement contained in the judgment entered by Judge Lewis in the SEC injunctive proceeding, that the evidence presented in that proceeding "falls far short of that necessary to find that [petitioner] had willfully violated any of the SEC laws" (J.A. 632), petitioner contends (Pet. 7-9) that under the doctrines of both res judicata and collateral estoppel, that judgment precluded his prosecution for criminal offenses based on the same misconduct.

Application of the concurrent sentence doctrine makes it unnecessary for the Court to consider these preclusion arguments (see Andreson v. Maryland, 427 U.S. 463, 469 n.4 (1976); Barnes v. United States, 412 U.S. 837, 848 n.16 (1973);[8/] but in any event, the arguments are without merit. As the court of appeals properly held (Pet. App. 7a-9a), the two proceedings involved different causes of action and the issues that petitioner contends are precluded in the second proceeding by collateral estoppel were not fully litigated in the first proceeding or

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8/ In the injunctive proceeding, the SEC alleged that petitioner had engaged in the offer and sale of unregistered securities and devised a scheme to defraud investors in the securities of NCCC. Only ten of the counts of the criminal indictment--five of the mail fraud counts (Counts 1, 3, 4, 6, and 7), and five of the securities counts (Counts 8-12)--pertained in whole or in part to the defrauding of investors (J.A. 7-26). On those counts petitioner was sentenced to concurrent five-year terms of probation to run concurrently with the sentences on the other counts in the indictment. Six of the other counts (Counts 2, 5, 13-16) alleged mail fraud of financial institutions and interstate transportation of monies fraudulently obtained from financial institutions; these were not embraced by the allegations in the civil proceeding (J.A. 19-27). Petitioner received an unsuspended sentence on only one count (Count 17), which alleged making a false statement to the Veteran's Administration--a crime wholly distinct from the matters at issue in the SEC proceeding (J.A. 28). Thus, even if petitioner's contentions were correct, the time he must serve would not be affected in the least.

actually determined by the judgment therein. Moreover, because the collateral estoppel issue involves only a dispute over the proper construction of the district court's judgment in the particular SEC proceeding, considered in the light of the district judge's statements made before and after entering it, the case is of limited significance.

1. Under the doctrine of res judicata, a final judgment on the merits in one suit bars the parties or those in privity with them from maintaining a second proceeding on the same cause of action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 359 (1876). The two proceedings involved here were not based on the same cause of action. The SEC proceeding was a civil, remedial action seeking wholly prospective relief; the instant case is a criminal action seeking punishment for past acts. The two types of proceedings are markedly different and do not constitute the same claim or cause of action. See United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-549 (1943); Helvering v. Mitchell, 303 U.S. 391, 399 (1938). Therefore, the doctrine of res judicata is inapplicable.

Petitioner's claim (Pet. 7) that the decision of the court below is inconsistent with Dranow v. United States, 307 F.2d 545 (8th Cir. 1962), is incorrect. In Dranow, as in this case, the court of appeals held that res judicata did not bar a criminal action following a civil proceeding involving the same subject matter. Although the Dranow court stated (307 F.2d at 556) that res judicata might apply to a criminal action even if the prior proceeding was civil in character, it qualified this proposition by holding (ibid.) that the doctrine applied only when "both actions are based upon the same facts and both have as their object punishment." Here, as in Dranow, the civil proceeding had no such object, so the criminal proceeding was not barred.

2. The doctrine of collateral estoppel, which concerns preclusion of issues as opposed to preclusion of claims, may apply even where the causes of action differ, e.g., where one is civil and nonpunitive and the other criminal. Allen v. McCurry, No. 79-935 (Dec. 9, 1980), slip op. 4; Yates v. United States, 354 U.S. 298, 335 (1956). But this doctrine precludes litigation only of those issues which the parties had a full and fair opportunity to litigate, which the parties did actually litigate, and which were necessary to the outcome of the first proceeding. Allen v. McCurry, supra, slip op. 4-5; Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 326 n.5; Montana v. United States, 440 U.S. 147, 153 (1979); United States v. Jacobson, 547 F.2d 21, 23 (2d Cir. 1976), cert. denied, 430 U.S. 946 (1977). Those requirements were not met here.9/

The issue of petitioner's culpability for past violations of securities laws was not fully litigated nor was a determination of that issue necessary to Judge Lewis's decision not to issue an injunction. Indeed, throughout the civil proceeding Judge Lewis made it clear to the participants that he was not concerned with whether petitioner had violated the SEC laws in the past, but only whether the SEC was entitled to injunctive relief because petitioner was likely to commit violations of the securities laws

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9/ Since this Court in Yates v. United States, supra, held only that the doctrine of collateral estoppel "is not made inapplicable" by the fact that it is invoked in connection with a criminal case and a preceding civil suit (354 U.S. at 335)--a proposition accepted by the court of appeals (Pet. App. 8a)--petitioner is incorrect in suggesting (Pet. 7) that Yates conflicts with the decision here. Standefer v. United States, No. 79-383 (June 9, 1980), on which petitioner also relies (Pet. 8), is similarly inapposite, since it held only that the doctrine of nonmutual estoppel was inapplicable where the prior proceeding was criminal, and suggested by negative inference that the doctrine would be applicable where the prior proceeding was civil. Here the doctrine was found generally applicable, but the court found that under the particular circumstances of this case no estopping judgment was shown.

in the future (Pet. App. 8a; J.A. 562-563).[10] Thus, all that can be said to have been conclusively established by the civil judgment is that petitioner did not have the type of ongoing involvement in securities violations that would have warranted an injunction.[11]

To be sure, Judge Lewis's order stated (J.A. 632) that the evidence failed to show that petitioner had willfully violated the securities laws, but another statement in the same order (ibid.) revealed that, in denying the injunction, Judge Lewis was relying in part on his knowledge that "this matter" had been "turned over to the United States Attorney for this District for further investigation." Expecting that allegations of past offenses by petitioner might be resolved in an action brought by the United States Attorney is, of course, inconsistent with making the judgment in the case before the court brought by another government agency depend on a determination of those same issues. Judge Lewis subsequently resolved the ambiguity in the SEC order when, before denying petitioner's pretrial motion based on res judicata and collateral estoppel theories, he characterized his earlier judgment as one issued "strictly and mainly on the grounds" that petitioner was no longer doing what he had been accused of doing (J.A. 56) and when he noted that "it wasn't necessary for me to determine whether he was doing it in the past or not" (J.A. 57). This clarification, of course, was also consistent with Judge Lewis's rulings constraining the SEC's

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10/ See, e.g., J.A. 568 ("we are not proving fraud"); J.A. 569 ("we will not find whether it's a 10(b) violation"); J.A. 581 ("I don't want to get into the merits of it"); J.A. 590 ("If I were going to make a finding of specific violations, I would be hearing the whole thing"); J.A. 558 ("I didn't let you prove the scheme to defraud, because that is not the question").

11/ Expectation that a prior wrong will not be repeated is a sufficient ground to refuse to issue an injunction, particularly in a securities case where the likelihood that the wrong will be repeated is "[t]he critical question for a district court in deciding whether to issue a permanent injunction." SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972).

presentation of evidence in the injunctive proceeding and with his frequent remarks during that proceeding that he had no intention of making findings with respect to the lawfulness of petitioner's past conduct (see page 11, note 10, supra).12/

In sum, in view of the unique facts of this case--the constraints on the litigation of the issue of liability for past violations of the securities laws in the first proceeding and the statements of the judge, made both before and after he entered the judgment, with respect to what issues he intended to determine--the court of appeals was correct in declining to find the government collaterally estopped from trying petitioner on criminal counts pertaining to the misconduct giving rise to the first action.

12/ There is no merit to petitioner's contention (Pet. 7) that it was improper for the court of appeals to consider statements made by Judge Lewis during the SEC case in order to determine the collateral estoppel effect of the judgment. As shown, those statements, taken in conjunction with Judge Lewis's explanation of the judgment after he had issued it, merely clarified an internally inconsistent order. Petitioner's reliance upon Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767 (3d Cir. 1975), and Segars v. Atlantic Coast Line R.R. Co., 286 F.2d 767 (4th Cir. 1961), is thus misplaced. In those cases, parties had attempted to attack apparently plain orders on the basis of "ambiguous" statements (Herman, supra, 524 F.2d at 772 n.11) and a "chance statement or observation" (Segars, supra, 286 F.2d at 770), which were made by the judges before they entered the orders in question and which lacked any subsequent confirming explanation by those judges.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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